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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
*Petitioner,*

*vs.*

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI.

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*Petitioner,*

*vs.*

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Hoskins Coal and Dock Corporation, plaintiff below, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court dismissing the complaint.

## OPINION BELOW.

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The opinion in the Court of Appeals is, as yet, unreported.

## JURISDICTION.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Sec. 1254, par. (1) (62 Stat. 928).

The decision to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on October 17, 1951. (R. 31.)

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this action pursuant to Sec. 4 of the Clayton Act (U. S. C. Title 15, Sec. 15) to recover treble damages for a violation of Secs. 1 and 2 of the Sherman Antitrust Act (U. S. C. Title 15, Secs. 1 and 2.)

Defendants below filed motions to dismiss the complaint on the ground, among others,[1] that the cause of action asserted had arisen in Illinois more than two years prior to the commencement of the action and was barred by the Illinois two-year statute of limitations covering suits for a "statutory penalty". (Ill. Rev. Stat. 1947, Chap. 83, Sec. 15.) (R. 16-21.) The District Court sustained the motions on the grounds therein stated and dismissed the complaint. (R. 21.)

The Court below affirmed on the sole ground that the

1. Other grounds alleged were: (a) The complaint charged only a private wrong and failed to disclose the restriction of any public right; (b) Interstate commerce was not involved; (c) The complaint failed to disclose any proximate connection between the injury to plaintiff's business and a violation of the law by defendants; (d) *Res adjudicata.* (R. 16-21.)

suit was not begun within two years after the cause of action accrued and was therefore barred. It did not consider the other grounds urged in support of the motions to dismiss. (R. 33.)

In its decision the Court below, in conformity with the ruling in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397, held that the controlling statute of limitations was that of the State of Illinois. It thereupon applied the two-year Illinois limitation statute governing suits for a "statutory penalty" on the ground that the object of Sec. 4 of the Clayton Act was to inflict a punishment on the party violating the Antitrust laws and was, therefore, penal in character. The Court below rejected petitioner's contention that these actions were covered by the Illinois five-year statute of limitations barring "civil actions not otherwise provided for", which governs suits for statutory remedies. (Ill. Rev. Stat. 1947, Chap. 83, Sec. 16.)

In reaching this conclusion the Court below relied on both federal and state cases which it erroneously deemed to be in point and controlling. (R. 31-33.)

The federal decisions relied upon by the Court below loosely used the term "penalties" as descriptive of treble damages under the antitrust laws. In none of these cases, was it held that an action for treble damages was to be considered penal for the purpose of applying a state statute of limitations. In relying on these federal decisions the Court below ignored the holding of this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397, decisions of Courts of Appeals for the 2nd, 5th, 9th and 10th circuits, and its own previous decisions which hold that actions for treble damages under the antitrust laws are remedial and compensatory and not penal in character.

The Court below also reached its conclusion that the action was one for a penalty by analogizing a treble damage action under Sec. 4 of the Clayton Act to an action under an Illinois statute which granted a recovery of treble damages against railroads making extortionate overcharges. This Illinois statute was held to be penal in *Chicago, Burlington & Quincy R. Co.* v. *Jones,* 149 Ill. 361, 375, 397. The Court below held that it was bound to follow this Illinois decision under the holdings of this Court in *Dibble* v. *Bellingham Bay Land Co.,* 163 U. S. 63, *Bauserman* v. *Blunt,* 147 U. S. 647, and *Pufahl* v. *Estate of Parks,* 299 U. S. 217.

These decisions, however, hold only that a federal court will look to state court decisions to determine the meaning and application of state limitation statutes in diversity cases and in cases involving substantive rights arising under state law. Here, in determining which state limitations provision was applicable the Court below had first to determine the nature of the right granted by Sec. 4 of the Clayton Act. Since this is a federally created right, a federal question is presented which should have been decided by reference to federal and not state law.

In determining the nature of this federally granted right by reliance on state decisions, the Court below is in direct conflict with this Court and Courts of Appeals for the 4th and 9th Circuits.

## QUESTIONS PRESENTED.

1. Are not actions under Sec. 4 of the Clayton Act remedial and compensatory, and not penal in nature, so as to make it improper to apply to them a state statute of limitations barring suits for a statutory penalty?

2. Where the determination as to which of several provisions of a state statute of limitations applies to a federally created action depends upon the nature of the action asserted, is it not improper to determine the nature of the federally created action by state and not federal law?

## STATUTES INVOLVED.

U. S. C., Title 15, Sec. 15.

Illinois Rev. Stat. 1947, Chap. 83, Secs. 15-16.

## REASONS FOR GRANTING THE PETITION.

**1. In holding an Illinois two-year Statute of Limitations barring suits for a statutory penalty applicable to treble damage actions under Sec. 4 of the Clayton Act on the ground that such actions under federal decisions are penal in nature, the Court below is in direct conflict with this Court and with the Courts of Appeals for the 2nd, 5th, 9th and 10th Circuits.**

The Court below held that an Illinois two-year statute of limitations covering suits for statutory penalties (Illinois Rev. Stat. Chap. 83, Sec. 15) was applicable to actions under Sec. 4 of the Clayton Act on the ground that such actions are penal in nature. (R. 33.) In so holding, the Court below is in conflict with the decision of this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397. In that case, this Court affirmed a decision of the Circuit Court of Appeals for the Sixth Circuit in *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 127 F. 23, 28, 29, holding that treble damage actions under the Antitrust Laws are for the enforcement of a civil remedy given by statute for a private injury and are compensatory in purpose and effect, although recovery is permitted in excess of actual damages.[1]

This Court, therefore, decided that such actions did not fall within the provisions of a federal five-year statute of limitations barring suits "for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." (Rev. Stat. § 1047, U. S. Comp. Stat. 1901,

1. For a full discussion as to why such actions are compensatory, see the opinion of the U. S. District Court in *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 101 F. 900, which was adopted by the Circuit Court of Appeals, 127 F. 23, 29.

p. 727; as now amended U. S. C. Title 28, Sec. 2462.) Since there was no other applicable federal statute of limitations, this Court concluded that the local Tennessee statute of limitations governed under the doctrine of *Campbell* v. *Haverhill,* 155 U. S. 610. However, this Court determined that it would not apply that provision of the Tennessee statute of limitations governing "statute penalties" because of its adherence to the construction of an action for treble damages under the Antitrust Laws which it had already adopted in determining that the Federal statute of limitations was not applicable, namely: that the action was not for a penalty.

This Court, by its affirmance of the decision of the Circuit Court of Appeals, sustained the reasoning of that Court that in no event could the Tennessee limitation statute governing suits for "statute penalties" be applicable; since if the action was one for a penalty, the federal limitation statute would govern and there would therefore be no necessity to look to the state law. *City of Atlanta* v. *Chattanooga Foundry & Pipe Works,* 127 F. 23, 28.

*The Court below has completely ignored the rationale of the Chattanooga case that the only reason a state statute of limitations is applicable in the first place is because treble damage actions under the Antitrust Laws are not penal, but compensatory and remedial.*

The Court below attempted to justify its holding by citing federal cases which allude to recoveries under Sec. 4 of the Clayton Act as "penalties." (R. 33.) In those cases the term "penalties" was loosely used and in none of them was that characterization required to reach the decision in the case. The reliance of the Court below on the loose language of those cases is startling in view of the contrary decisions of the Courts of Appeals for the 2nd, 5th, 9th and 10th Circuits, as well as its own decisions,

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directly holding that such actions are remedial and compensatory. None of these latter decisions are even referred to by the Court below although they are in conflict with its decision here.

Thus in *Hicks* v. *Bekins Moving & Storage Co.* (CA—9), 87 F. 2d 583, 585; *United Copper Securities Co.* v. *Amalgamated Copper Co.* (CA—2), 232 F. 574, 577; *Sullivan* v. *Associated Billposters & Distributors* (CA—2), 6 F. 2d 1000, 1009; and *Fazakerly* v. *E. Kahn's Sons Co.* (CA—5), 75 F. 2d 110, 114, it has been held that such an action was not penal and therefore either survived the death of one of the parties or could be revived. In *Burnham Chemical Co.* v. *Borax Consolidated, Limited* (CA—9), 170 F. 2d 569, 571, 575, 578, and *Oklahoma* v. *American Book Co.* (CA—10), 144 F. 2d 585, 587, the Courts refused to apply to these actions state limitations statutes of California and Oklahoma, respectively, governing statutory penalties. In *Baush Machine Tool Co.* v. *Aluminum Co. of America* (CA—2), 63 F. 2d 778, 780, a bill of discovery in aid of a suit under Sec. 4 of the Clayton Act was held to be properly granted since such an action was not for the enforcement of a penalty.[1]

The Court below is also in conflict with its own decisions in *Roseland* v. *Pfister Mfg. Co.* (CA—7), 125 F. 2d 417, 419, and *Activated Sludge, Inc.* v. *Sanitary District of Chicago* (CA—7), 157 F. 2d 517, adopting the opinion of the District Court in the same cause, 64 F. Supp. 25, 35, that actions under Section 4 of the Clayton Act are remedial

1. District Courts of the United States have consistently adhered to the decision in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 that actions under Sec. 4 of the Clayton Act are remedial and not penal. See *Christensen* v. *Paramount Pictures, Inc.*, (C. D. Utah), 95 F. Supp. 446, 450; *United West Coast Theatres Corp.* v. *South Side Theatres Co.* (S. D. Cal.), 86 F. Supp. 109, 110; *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.* (S. D. N. Y.), 100 F. Supp. 15, 28, 29; *Momand* v. *Universal Film Exchanges, Inc.* (Mass.), 43 F. Supp. 996, 1008.

and not penal. The judge delivering the opinion of the Court below in the case at bar did not refer to these two decisions, which is curious since he wrote both of them.

The conflict between the Court below and this Court as well as with so many Courts of Appeals for other Circuits is a matter of great public importance which this Court should correct in its desire to achieve a uniform application of the Antitrust Laws.

**2. In characterizing an action under Sec. 4 of the Clayton Act as penal in nature because of the multiple damage feature of the recovery permitted, the Court below is in conflict with decisions of this Court and Courts of Appeals for the 2nd, 3rd and 9th Circuits.**

In addition to the conflicts above set out, the decision below also conflicts with the holdings of this Court in *Brady* v. *Daly,* 175 U. S. 148, 154-157, construing actions under the Copyright Act, and *Overnight Motor Transportation Co., Inc.* v. *Missel,* 316 U. S. 572, 583, construing actions under the Wages & Hours Act, that enlargement of damages under those acts, respectively, did not convert the actions into prosecutions for a penalty. The principle of *Brady* v. *Daly,* 175 U. S. 148, 154-157, has been applied to actions under Section 4 of the Clayton Act. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 397; *Baush Machine Tool Co.* v. *Aluminum Co. of America* (CA—2), 63 F. 2d 778, 780.

Further the decision below also conflicts with two 9th Circuit decisions, *Culver* v. *Bell & Loffland* (CA—9), 146 F. 2d 29, 31, and *Kessler* v. *Fleming* (CA—9), 163 F. 2d 464, 468, and a decision of the 3rd Circuit, *Fields* v. *Washington* (CA—3), 173 F. 2d 701, 703. These cases hold that actions for double damages under the Wage & Hours Act and for treble damages under the Emergency Price Control Act and the Housing & Land Act are compensatory and not penal.

**3. In determining the nature of the action based upon Sec. 4 of the Clayton Act by resort to state rather than federal decision the Court below is in direct conflict with this Court and the Courts of Appeals for the 4th and 9th Circuits.**

This Court has held that the nature of a right created by federal statute is a federal question which is determined by federal and not state law. *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89, 95; *Dietrick* v. *Greaney,* 309 U. S. 190, 200, 201; see concurring opinion of Mr. Justice Jackson in *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.,* 315 U. S. 447, 471.

The Courts of Appeals for the 4th and 9th Circuits, in applying local statutes of limitation, have followed this rule in construing the nature of the rights granted by Sec. 4 of the Clayton Act, *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n* (CA—4), 128 F. 2d 645, 648-650; *Glenn Coal Co.* v. *Dickinson Fuel Co.* (CA—4), 72 F. 2d 885, 890, and also in construing the nature of the rights granted by the Wages & Hours Act, *Culver* v. *Bell & Loffland* (CA—9), 146 F. 2d 29, 31.

The Court below in here applying the Illinois statute of limitations was first required to ascertain the character of petitioner's action. This follows from the terms of that statute, which makes its applicability dependent upon the nature of the cause of action asserted. Since petitioner's action was brought under Sec. 4 of the Clayton Act the determination of its nature was a federal question, and in the light of the decisions of this Court and of the Courts of Appeals for the 4th and 9th circuits, this determination should have been made by recourse to federal decisions. The Court below, however, disregarded this familiar principle of law which would have required it under the federal decisions hereinbefore discussed,

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pp. 6 to 8, to conclude that such actions are compensatory and remedial and not penal and therefore not within the Illinois limitation statute covering suits for statutory penalty.

Instead, the Court below chose to rely upon Illinois decisions holding that when the object of a statute is to inflict punishment upon a party violating it the statute is penal in character, even though a remedy is afforded to those having an interest in its observance. (R. 33.)

The Court below seized upon one of these Illinois decisions, *Chicago, Burlington & Quincy R. Co.* v. *Jones,* 149 Ill. 361, 375, 397, as providing an analogy between an action under Sec. 4 of the Clayton Act and an action under an Illinois statute granting treble damages against railroads making extortionate overcharges. This Illinois statute was there held to be penal. The Court below therefore concluded that actions under Sec. 4 of the Clayton Act were penal and hence within the two-year Illinois Statute of Limitations covering "statutory penalties."

The reliance of the Court below upon these Illinois decisions was founded upon its understanding based on *Dibble* v. *Bellingham Bay Land Co.,* 163 U. S. 63; *Bauserman* v. *Blunt,* 147 U. S. 647, and *Pufahl* v. *Estate of Parks,* 299 U. S. 217, that in determining which of the several provisions of the Illinois limitations statute controls, it was bound by interpretations of that statute by the Illinois courts. (R. 31, 32.) But, in relying on those cases to justify the use of Illinois decisions to interpret the nature of rights arising under a federal statute, the Court below misapplied the holding of those cases.

The *Dibble* and *Bauserman* cases stand for the proposition that a federal court will apply the same limitation to an action based upon a state substantive right that the state courts would apply to that action. In both of those cases

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it was not necessary, as here, to determine the nature of the cause of action relied upon, and even if it had been necessary it would have been quite proper to do so under state decisions since in each of these cases a state created right was relied upon.

The *Pufahl* case held only that a local statute of limitations was applicable to an action brought in a state court to enforce a claim in probate arising under the National Banking Act. It is quite pertinent to note that in that case the nature of the federally created right was first determined under federal law before the local statute was applied.

In none of these cases was the nature of a federally created right ascertained by state decisions nor was it necessary for the Court to make a choice of one of several provisions of a state statute of limitations, and hence they are not in point.

Moreover, the *Dibble, Bauserman* and *Pufahl* cases would here only authorize the use of Illinois decisions which interpret the Illinois limitations statute. The Court below, however, went far beyond such permissible limits and relied on Illinois decisions which construed the nature of state statutes granting substantive rights of action. It thus construed the nature of a federally created right by reference to state court decisions, which, as above pointed out, brings the Court below in conflict with this Court and the Courts of Appeals for the 4th and 9th Circuits. Further, even under Illinois law, the Court below is in plain error in characterizing actions under Sec. 4 of the Clayton Act as penal by analogy to Illinois cases, for it is the law in Illinois that its State Courts will interpret federal statutes according to federal decisions, even when the rule of the state on a similar matter is to the contrary. *Rothschild & Co.* v. *Steger Piano Co.*, 256 Ill. 196, 205, 206.

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In addition, the Court below is again in conflict with itself. In *Moore* v. *Backus* (CA—7), 78 F. 2d 571, 575, the Court held that the "character of the legal action" under Section 4 of the Clayton Act "is to be determined by the federal court," as the Antitrust Laws are general in nature and "successful enforcement would seem to require a uniform interpretation."

We agree with the Court of Appeals for the Seventh Circuit that the need for uniformity in the interpretation of the Antitrust laws requires that their character be determined by federal courts. This Court should grant certiorari to resolve the conflict created by the decision of the Court below in order that uniformity may be established.

**4. The decision of the Court below is of wide public importance, since, if permitted to stand, it will affect not less than 23 private antitrust cases now pending in the United States District Court for the Northern District of Illinois. In addition, it has impact on cases pending in other Districts. It will also discourage the bringing of future suits, thus jeopardizing the effectiveness of ancillary enforcement of the antitrust laws by means of private actions.**

There are at present at least 23 private antitrust suits pending in the United States District Court for the Northern District of Illinois. These suits were filed when it appeared that this Court had taken the view that the Illinois five-year statute of limitations applied to actions under Sec. 4 of the Clayton Act. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251.[1]

1. Although the applicable statute of limitations was not an issue in that case, nevertheless the plaintiff was permitted to recover for damages during the period of five years immediately preceding the filing of the complaint. (See *Bigelow* v. *RKO Radio Pictures, Inc.* (CA—7) 150 F. (2d) 877, 879.)

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The effect of the decision below either reduces the period for which damages in those cases are recoverable, or outlaws them completely.

In addition, the decision below will have impact in those District Courts of the United States located in states having local statutes of limitation of shorter duration governing statutory penalties than their statutes covering remedial and compensatory actions. For example, this decision, if followed in other circuits, will greatly affect private antitrust suits brought in New York, Ohio, California, Florida, Iowa, Indiana, Wisconsin, Tennessee and Delaware.[2]

The effect of the decision below is thus national in scope affecting cases in which millions of dollars in damages have been suffered by plaintiffs at the hands of monopolists and restrainers of trade.

Further, as a result of the decision below substantially

2. *California:* One year upon a statute for a penalty or forfeiture; three years upon a liability created by statute, other than penalty or forfeiture. Deering, Civil Procedure and Probate Codes of California (1949) Secs. 340, 338. *Delaware:* One year on a civil action for a forfeiture upon a penal statute; three years for other actions based on a statute. Revised Code of Delaware (1935), Ch. 146, Par. 5136, Sec. 13, Par. 5129, Sec. 6. *Florida:* Two years upon a statute for a penalty; three years upon a liability created by statute, other than a penalty. Fla. Stats. Ann. § 95.11 (5), (6). *Indiana:* Two years for actions upon a penalty given by statute; fifteen years upon actions not otherwise provided for. Burns—Ind. Stat. Ann. (1946), Secs. 2-602, 2-603. *Iowa:* Two years for a statutory penalty; five years for actions not otherwise provided for. Iowa Code Ann. (1950), Sec. 614.1 (3) and (5). *New York:* Three years for an action upon a statute for a penalty; six years upon a liability created by statute, except a penalty. Civil Practice Act (New York), Art. 2, Pars. 49 (3), 48 (2). *Wisconsin:* Two years upon a statute penalty; six years upon an action for injury to property. Wisc. Stats. (1949) Secs. 330.21 (1), 330.19 (5). *Ohio:* One year upon a statute for a penalty; six years if not a penalty. Page's Ohio Gen. Code Ann., Secs. 11225, 11222. *Tennessee:* One year on statutory penalties; ten years on actions not otherwise provided for. Williams Tenn. Code Ann. (1934), Secs. 8595, 8601.

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lessening the time within which damages may be recovered, prospective plaintiffs will be discouraged from bringing their suits. The limited amount of damages recoverable will not in many instances justify undertaking the risks attendant upon the expenditure of large amounts necessary to bring treble damage actions to trial.

Private actions under Sec. 4 of the Clayton Act aid in the enforcement of the Antitrust Laws and such enforcement is in the public interest. *Bruce's Juices, Inc.* v. *American Can,* 330 U. S. 743, 752; *Maltz* v. *Sax* (CA—7), 134 F. (2d) 2, 4; *Quemos Theatre Co., Inc.* v. *Warner Bros.* (N. J.), 35 F. Supp. 949, 950. Where, as here, such ancillary enforcement is severely curtailed, the public interest demands the exercise by this Court of its supervisory powers.

**Conclusion.**

The decision of the Court of Appeals for the Seventh Circuit that the determination of the character of the action under Sec. 4 of the Clayton Act, is not a federal question, but must be determined according to state decisions, strikes at the very foundation of the method of interpreting federal statutes. Such decision is in plain conflict with decisions of this Court and Courts of Appeals of other circuits which hold that the interpretation of a federal statute is a federal question and must be determined according to federal decisions. In the vital interest of securing uniform interpretation of federal statutes such conflict should be resolved by this Court.

Further, the decision of the Court below that actions under Sec. 4 of the Clayton Act are penal and not remedial in character, even according to federal decisions, is directly contrary to decisions of this Court and of numerous other Federal courts of review. A corollary to this proposition is that in Illinois, and in many other states, a much

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shorter statute of limitations will govern such actions than if they are held to be remedial in character. This decision thus affects not only the case at bar, but 23 other private antitrust cases now pending in the District Court for the Northern District of Illinois, and numerous cases pending in other districts. The decision also discourages future private antitrust suits.

The conflict of the decision below with the decisions of this Court and other Courts of Appeal, its direct effect on pending cases of numerous other litigants, its deterrent effect on ancillary enforcement of the Antitrust Laws through private suits, the paramount public interest in preserving the vitality of the Antitrust laws, all combine to urge this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

## No. 501

HOSKINS COAL AND DOCK CORPORATION,
*Petitioner,*

*vs.*

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
*Respondents.*

## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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This action is the second suit between the same parties, dealing with the same subject matter and presenting the same claim for damages. The first action was tried before a jury and, at the close of petitioner's case, was dismissed on each defendant's motion for a directed verdict. Petitioner took no appeal therefrom. Approximately four years after commencing the first action and 60 days before its trial, petitioner filed the present action.

### OPINION BELOW.

The opinion of the Court of Appeals (R. 31-33) is reported in 191 F. 2d 912.

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## JURISDICTION.

The judgment of the Court of Appeals was entered on October 17, 1951. (R. 34.) Petitioner filed its petition for writ of certiorari on December 28, 1951, invoking jurisdiction of this Court under 28 U. S. C., § 1254(1).

## STATEMENT.

The petition for certiorari fails to state the facts upon which the District Court dismissed this action on the ground, among others, of *res judicata*.

### The 1945 Action.*

On August 29, 1945 petitioner filed its 1945 action against these two respondents in the United States District Court for the Northern District of Illinois. (R. 42.) The complaint alleged that respondents had entered into a common law conspiracy, the object of which was to injure petitioner's business in Chicago in retailing Illinois No. 5 seam coal. The conspiracy was effectuated, according to the complaint, by the purchase by each respondent of a mine from which petitioner had theretofore bought coal, and by the refusal of each respondent thereafter to sell petitioner coal produced at the mines. The complaint sought single damages of $500,000. (R. 60-65.)

Trial of the 1945 action began before a jury on September 23, 1949, after the use of pretrial discovery and the denial of respondents' motions for summary judgment. (R. 42.) The evidence disclosed that many mines located in Fulton County, Illinois, produced No. 5 seam coal. For

* To distinguish this earlier action from the present case, thus to avoid confusion between the two lawsuits in the same court each with the same plaintiff and the same defendants, the earlier action will hereinafter be referred to as the "1945 action."

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several years Truax had owned and operated one, and United two, of these many mines.* These three mines were located so close to the Illinois River as to permit a profitable utilization of barge shipment of such coal as distinguished from more costly rail shipment. Two other Fulton County mines, Little Sister and, subsequently, Rushville, were also so favorably located. (R. 43-45.)

In 1938 petitioner began purchasing coal from the Little Sister mine, barging it to Chicago for sale at a laid down cost of 50 to 65 cents per ton under the same coal shipped by rail. In 1944 the owner of Little Sister died and the mine was sold, the buyer making Truax his sales agent. (R. 44.) There was no evidence that United had any knowledge of the offering of Little Sister for sale, or of the sale itself, or of the agency arrangement with Truax.

After the sale of Little Sister, petitioner began to buy coal from the Rushville mine. Due to serious illness the owner of that mine decided to sell it, and both petitioner and United negotiated for it, United buying the mine in 1945. United did not know that petitioner had been buying Rushville coal or had made a bid for the mine. (R. 45-46.) There was no evidence that Truax had any knowledge that petitioner was buying Rushville coal, or that the Rushville mine was being offered for sale, or that United had bought the mine.

The war period of 1943 to 1945 was a period in which any producer or coal merchant could sell all of the coal he could produce or buy. (R. 48.) Truax refused to sell petitioner coal after it became sales agent for Little Sister because it had an inadequate supply of coal to meet its own requirements. (R. 45.) Some evidence indicated that Truax's refusal was also based on the reputation of plain-

* For brevity, respondent, Truax Traer Coal Company, will be referred to as "Truax" and respondent, The United Electric Coal Companies, as "United."

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tiff as a "price cutter." (R. 47.) In 1942 United had refused petitioner's request to sell coal to one of petitioner's customers because United had no coal for sale at the time. (R. 47.) In 1945 United refused to sell petitioner Rushville coal but in 1946 sold some coal to petitioner on the basis of "cash in advance", because upon checking references, United found producers were protecting their sales to petitioner by these terms. (R. 47.) There was no evidence that either respondent knew petitioner had asked the other for coal and had been refused.

Petitioner adduced considerable evidence that he had complained to the Solid Fuels Administration for War concerning Truax's refusal to sell petitioner coal after the sale of the Little Sister mine. (R. 45.) It introduced evidence showing that each respondent belonged to Middle States Fuels, Inc., a producers' association formed under the Bituminous Coal Act, but petitioner was unsuccessful in attempting to show that respondents sought to induce other members of this Association not to sell coal to petitioner. (R. 48-49.) Petitioner, also unsuccessfully, attempted to show that each of the respondents, after the sale of the two mines, sought and secured, as customers, petitioner's former customers. (R. 47-48.) Finally, petitioner sought to prove a wrongful motive on the part of respondents by showing that petitioner was a "price cutter" in the Chicago retail market, and, in this connection, petitioner introduced in evidence the regulations and minimum coal prices established under authority of the Bituminous Coal Act. (R. 48.)

At the close of petitioner's case, which consumed six days, during which eighteen witnesses, including six of respondents' present and former officers and employees, were examined by petitioner, eighteen exhibits introduced by it (R. 42-43), and a record of 710 pages built up (R. 41), respondents each moved for a directed verdict in its favor.

The District Judge granted this motion on the ground, among others, that there "is no evidence that they [the respondents] did it [the acts alleged] in combination or conspiracy * * *." (R. 49.) Petitioner did not appeal from the judgment. (R. 50.)

**The Present Action.**

During the summer preceding this trial, petitioner filed this present action. (R. 2.) Petitioner's complaint is a repetition of its complaint in the 1945 action (cf. R. 3-15 and R. 60-65), but dressed up with a summarization of the evidence which petitioner had prepared for trial of the 1945 action and with insertion of the phrase "interstate commerce" at various places. Petitioner still complains of its supposed injury of $500,000, although since its present complaint is brought under Section 4 of the Clayton Act,* this ad damnum is trebled to amount to $1,500,000, together with costs of suit and a reasonable attorney's fee. (R. 15.) Respondents promptly moved to dismiss the present action on the grounds that the cause of action arose in the State of Illinois more than two years prior to the commencement of the action,** and that, in any event, the complaint failed to state a claim under Section 4 of the Clayton Act but alleged at the most a private grievance involving intrastate commerce. (R. 16, 17.) Subsequent to the adjudication of the 1945 action, respondents each filed supplemental motions to dismiss the present action

* 38 Stat. 731, 15 U. S. C. § 15.

** This called into play Ill. Rev. Stat., ch. 83, § 15, which provides that "Actions for damages" for personal injuries, among others, "for a statutory penalty * * * shall be commenced within two years next after the cause of action accrued." As the Court of Appeals noted (R. 32), petitioner had insisted that its treble damage action ought to fall within the terms of the Illinois five year statute, Ill. Rev. Stat., ch. 83, § 16, applicable to actions on unwritten contracts "and all other civil actions not otherwise provided for."

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on the grounds of *res judicata* and estoppel. (R. 19, 20.) The District Court, on March 1, 1951, dismissed the present action for the reasons set forth in these motions and supplemental motions. (R. 21.)* The Court of Appeals felt it unnecessary to reach the other aspects of the case, sustaining, as it did, the judgment of the District Court on the sole ground of the Illinois two year statute of limitations. (R. 33.)

In the Court of Appeals both petitioner and respondents argued that the Illinois law of limitations is applicable to actions for treble damages under Section 4 of the Clayton Act. The issue before that court was which of two Illinois provisions applied: the two year, or the five year, provision. The Court of Appeals applied the two year bar in the present action, and affirmed the judgment of the District Court (R. 32-33), since under the decisions of the Supreme Court of Illinois actions for treble damages under rights created by Illinois must be brought within two years next after they accrue.

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* Petitioner, in its appeal to the Court of Appeals in this present action complaining of the District Court's judgment (R. 22), failed to designate the record in the 1945 action which respondents had physically brought into the present action in the District Court. (R. 40.) The respondents therefore brought the 1945 record up to the Court of Appeals (R. 40), pointing out to that court that the parties to the 1945 action and the present were the same in both cases, as were also the business allegedly injured, the charges of conspiracy, the acts of the defendants, and the claim of injury and damages.

The same omission from the record was made in the designation to this Court. (R. 41.) At respondents' suggestion, and with respondents' aid, the record in the 1945 action was boiled down to narrative form and, in such form, stipulated before this Court as fair, true and correct. (R. 41.)

## QUESTIONS PRESENTED.

Respondents respectfully suggest that the two questions posed by the petition properly are these:

1. Is it not proper to apply to the present action, which seeks treble damages under Section 4 of the Clayton Act and was brought in a federal District Court in Illinois, the limitation law of the State of Illinois which would apply to such action, if state created?

2. Is it not proper to bar petitioner from re-asserting in the present action the same claim of conspiracy which was decided adversely to petitioner, in the 1945 action, where in both actions the business allegedly injured, the charges of conspiracy, the acts of respondents, and the claim of injury and damages were all the same, and the only difference between the two actions was the theory of recovery?

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## ARGUMENT.

### I.

### THERE IS NO FEDERAL QUESTION OF SUBSTANCE INVOLVED IN THIS ACTION.

#### A. The Illinois Two Year Statute of Limitations Applies to Actions for Treble Damages.

The Supreme Court of Illinois holds that the Illinois two year statute of limitations applies to treble damage actions and the Illinois five year statute of limitations applies to like actions for single damages. Petitioner does not dispute that if this treble damage action were created by the laws of the State of Illinois it would be barred by the Illinois two year statute.

These principles were squarely established in Illinois as long ago as *Chicago, Burlington & Quincy Railroad Company* v. *Jones,* 149 Ill. 361, 37 N. E. 247 (1894), in which case the Illinois Supreme Court held the Illinois two year statute applicable to an Illinois statutory treble damage claim which was in all substantial respects identical with the language of Section 4 of the Clayton Act.

The *Jones* case involved a claim, under the Illinois railroad anti-discrimination act,* by a shipper of livestock against the carrier to recover for alleged charges in excess of the schedule of reasonable maximum rates established by the Illinois Railroad and Warehouse Commissioners. The shipper, in all counts but one of his complaint, sought in the words of the Illinois statute, to "recover from such railroad corporation, in any form of action, three times the amount of damages [the amount of the overcharge] sus

* Illinois Laws 1873, p. 135, now Ill. Rev. Stat. 1951, ch. 114 §§ 118 to 127.

tained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court."* In his last count, the shipper sought, alternatively, to recover single damages for the violation of the railroad's common law liability as a carrier for charging more than reasonable rates.

The Supreme Court of Illinois held, first, that the Illinois two year limitations law—Chapter 83, § 15—was applicable to the shipper's claim for treble damages, and second, that the Illinois five year limitations law—Chapter 83, § 16—was applicable to the shipper's claim for single damages. (149 Ill. 361, 397-399, 37 N. E. 247, 258.) This construction of the Illinois law has never been questioned. It was examined and accepted by the District Judge and by the three judges of the court below, all of whom are constantly required to pass upon Illinois law questions. One of the three judges, the writer of the opinion for the court below, has long been a resident and lawyer of Illinois.** Cf. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707-708 (1949); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 398 (1906).

The present action was therefore brought in a forum of a state whose two year limitations statute has been constantly construed by its highest court to read as if written thus: "Actions for treble damages * * * shall be commenced within two years next after the cause of action accrued."

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* Ill. Rev. Stat. 1951, ch. 114, § 123.

** Judge Walter C. Lindley was born in Neoga, Illinois, on July 12, 1880, was graduated from the College of Law of the University of Illinois with a bachelor of laws degree in 1904 and a juris doctor degree in 1910, and had practiced in Danville, Illinois, until his appointment as a federal judge in 1922.

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### B. The Court Below Correctly Applied the Illinois Two Year Statute to the Present Action.

Under the decisions of this Court the court below properly applied the Illinois laws of limitations to the present action. This Court has specifically held, in a treble damage action brought under the Sherman Act,* that Congress, by its silence in the matter, must be presumed to have intended to make such action dependent upon the local limitation laws of the state of the forum; and that, in such action, the local state law is to be determinative of which of its limitation provisions is applicable. *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397 (1906), citing the Rules of Decision Act, at that time Rev. Stat. § 721.**

As a matter of Congressional command, the court below has also properly applied the Illinois two year statute of limitations. This Court has consistently held, under the Rules of Decision Act,*** that federal courts are constrained to follow and apply state laws in cases where they apply. *Bauserman* v. *Blunt,* 147 U. S. 647, 652 (1893); *Dibble* v. *Bellingham Bay Land Company,* 163 U. S. 63, 73 (1896). Particularly in the instance of statutes of limitations is the Rules of Decision Act to be steadfastly and consistently applied. *Campbell* v. *Haverhill,* 155 U. S. 610,

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* 26 Stat. 210; cf. 15 U. S. C., § 15 and note.

** "Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to local law by the silence of the Statutes of the United States. Rev. Stat. § 721; *Campbell* v. *Haverhill,* 155 U. S. 610." 203 U. S. 390, 397.

*** 1 Stat. 92; 28 U. S. C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

614 (1895). And under the Rules of Decision Act, the construction given to the statute of limitations, by the highest court of the state concerned, is regarded as part of the statute, and is as binding upon the courts of the United States as the text. If the highest court of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudication. *Leffingwell* v. *Warren,* 2 Black 599, 603 (U. S. 1862); *Bauserman* v. *Blunt,* 147 U. S. 647, 654 (1893).

Petitioner, though it agrees with the first principle stated, argues that the second principle applies only to diversity cases and not to actions brought to enforce a federally created right. (Petition, p. 4, 11-12.) This contention is clearly erroneous. The consistent rule of this Court has been that the adherence to state law commanded by the Rules of Decision Act must be followed in federal causes of action—that such are "cases where they [state laws] apply." *Campbell* v. *Haverhill,* 155 U. S. 610 (1895) (Massachusetts statute of limitations applied to patent infringement action); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390 (1906) (Tennessee limitations statute applied to Sherman Act treble damage action; choice of which state statute left to local law); *Pufahl* v. *Estate of Parks,* 299 U. S. 217 (1936) (Illinois common and statutory limitations law applied to claim of receiver of insolvent national bank); *Rawlings* v. *Ray,* 312 U. S. 96 (1941) (Arkansas statute of limitations applied to action to recover assessment upon shares of insolvent national bank); *Cope* v. *Anderson,* 331 U. S. 461 (1947) (Ohio and Pennsylvania law governs period in which to bring suit on Comptroller's assessment laid on shares of insolvent national bank).

Petitioner's chief argument seems to be that actions under Section 4 of the Clayton Act do not, by trebling the

damages, impose a penalty, and that no state statute of limitations covering, among other matters, actions for damages for statutory penalties, can therefore ever be applied. (Petition, p. 7.) This contention will not stand scrutiny. Petitioner relies for this contention on *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906). This Court, however, held in that case that the federal statute of limitations, Rev. Stat. § 1047, covered that restricted type of statutory penalty (*i.e.*, statutes penal in the international sense)* which was not imposed by Section 7 of the Sherman Act, and that, under Tennessee law, the "statute penalties" provision of the Tennessee statute was not to be distinguished in its scope from Rev. Stat. § 1047, but was coextensive with it. 203 U. S. 390, 398.** In other words, since the coverage of Rev. Stat. § 1047 was too restricted to be applicable, the state statute of the same limited scope was likewise inapplicable. This Court clearly did not hold in the *Chattanooga* case either (1) that federal courts were to be precluded from applying state penalty limitation laws—which might be broader in their scope than the Tennessee law—or (2) that a treble damage antitrust action does not impose a penalty in any sense of the word, whether private or public. Such an erroneous reading of that case would be at odds with the fact that the Court there felt it necessary to determine the reach of the Tennessee one year statute. 203 U. S. 390, 397 (1906). Mr.

* Reference was made in the *Chattanooga* decision to *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892), and to *Brady* v. *Daly*, 175 U. S. 148, 155, 156 (1899). See 203 U. S. 390, 397. These page references demonstrate that the Court was distinguishing between private and public wrongs; Rev. Stat. § 1047 was applicable only to the latter.

** It is interesting to observe that the Tennessee Supreme Court has reaffirmed the point that, under Tennessee law, its one year limitations statute is inapplicable to an action which permits the recovery of exemplary damages in excess of actual damages. *Doty* v. *Federal Land Bank of Louisville*, 173 Tenn. 140, 114 S. W. 2d 952 (1938).

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Justice Holmes, who wrote for the Court in the *Chattanooga* case, later wrote for the Court in *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916) of the Sherman Act "penalty of triple damages."* Other courts have similarly described the treble damage anti-trust action.**

Respondents therefore respectfully suggest that the unaltered course of the decisions of this Court admits of no alternative to the question: That, as long as the State of Illinois bars its treble damage actions by its two year statute of limitations, it was proper for the court below to apply this bar to the present action.

If the court below had not applied the Illinois two year statute as a bar to petitioner's reasserted claim, the court would have discriminated in favor of federal causes of action and thus would have disobeyed the statutory command which our very first Congress has placed upon the federal courts: That equal treatment be accorded to actions involving, as in this present action, the laws of the several states, irrespective that the forum be state or federal.*** As was noted as long ago as *Campbell* v. *Haver-*

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* "* * * we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." 240 U. S. 27, 29.

** *Sullivan* v. *Associated Bill Posters and Distributors*, 6 F. 2d 1000, 1012 (2nd Cir. 1925) ("punitive or exemplary damages"); *Decorative Stone Co.* v. *Building Trades Council*, 23 F. 2d 426, 427 (2nd Cir. 1928) ("penal damages"); *H. J. Jaeger Research Laboratories* v. *Radio Corp.*, 90 F. 2d 826, 828 (3rd Cir. 1937) ("statutory trebling penalty"); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 996 (8th Cir. 1945) ("the multiplication of the damage * * * is in the nature of a penalty").

*** It is interesting to observe that the reason state courts were not given concurrent jurisdiction with the federal courts of treble damage Sherman Act claims was due to the belief on the part of Senator Hoar, at that time managing the bill for the Judiciary Committee, that it would have been unconstitutional to have placed such penal actions within the competence of state courts. In a

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*hill*, 155 U. S. 610, 616 (1895) (involving an action at law for patent infringement where this Court applied the Massachusetts limitation law applicable to torts):

> "* * * If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, *must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?*" (emphasis supplied.)

Petitioner would apparently have it that local state laws of limitation apply to Section 4 Clayton Act actions, that the selection of the pertinent local state provision is controlled by state law, which becomes part of the text of the statute, that Illinois treble damage actions are governed by the Illinois two year limitations law, but that petitioner's case is, or should be, an exception.

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debate which resulted in the elimination of an amendment which would have given state courts such jurisdiction, Senator Hoar said [21 Cong. Rec. 3146-7 (1890)]:

> "This section which is proposed to be amended is a section establishing a penalty, threefold damages. Now, you can not clothe a State court with the authority to enforce a penalty.
>
> * * *
>
> "We might perhaps say that a person who owed to another a sum of money under an obligation solely the creature of a statute of the United States might recover in any State court; and if the obligation were created he could recover it equally, whether we said so or not; but we cannot say that a State court shall be clothed with jurisdiction to enforce a claim for threefold the damages suffered, which is purely penal and punitive."

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Petitioner would also apparently have it that in its case the remedy should not be enforced in the manner common to like actions in Illinois; that, instead, the courts below should have rejected the Illinois two year statute of limitations, which the Illinois Supreme Court has construed as applying to such actions as petitioner's, and should have applied the Illinois five year statute of limitations, which the Illinois Supreme Court has construed as being inapplicable to such actions as petitioner's.

The action of the court below, being in accordance with the statutory command of Congress and in conformity with the consistent teaching of this Court, presents no federal question worthy of review by this Court. In accordance with the general policy of this Court, the decision of the court below on a question of state law should be left undisturbed. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 708 (1949).

## II.

### THE DECISION OF THE COURT BELOW PRESENTS NO CONFLICT.

The decision of the court below is the only decision of any federal court that decides which Illinois statute of limitations applies to Section 4 Clayton Act actions. Hence, the court below necessarily could not have "rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." (Rule 38 of this Court.) Petitioner's extended argument to the contrary (Petition, p. 6-13), and claim of conflict with other circuits, are therefore without foundation.

### A. The Limitations Laws of Illinois Are Indigenous.

The decision of the court below, applying the Illinois two year statute of limitations to the present action, does not

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and can not, in the very nature of the case, present a conflict of decision within the federal judiciary. This is so since the Illinois State Court's construction of its two year limitation law is, of course, indigenous to Illinois and is a matter of no concern to other states, whether with different limitation laws or mayhap, with the same apparent statutory pattern or identical language. *Bauserman* v. *Blunt*, 147 U. S. 647, 657 (1893); *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, 34 (1924).*

Since the question of the content and reach of the Illinois two year limitations statute is controlled by the law of the State of Illinois, and is not of moment in forums dealing with the laws of other States, there can of course be no conflict with other circuits. As this Court said in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 (1938):

> "* * * As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

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* "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein." 265 U. S. 30, 32.

"* * * But if we assume, for the moment, that the two statutes are alike, nevertheless, our determination must be the same. It was within the competency of the federal court to construe the Indiana statute in one way, and it was equally within the competency of the Nebraska Supreme Court to construe the Nebraska statute in an opposite way; and, since the construction becomes part of the statute and is to be read as though in its text, in the one case as in the other, the result is that they are, in effect, not the same, but different statutes * * *" 265 U. S. 30, 34.

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This intramural effect of the local law of one state only, among the forty eight of our Union, by its very nature is incapable of providing a result in conflict with what other courts, in other forums and with other laws, may decide—unless the initial resort to such local law was erroneous, which, as has been seen, is not the case here.

Further, it is misleading and erroneous in two respects to state that the decision of the court below will have impact in the federal courts located in states having penalty limitations laws shorter than those covering "remedial" actions. (Petition, p. 14.) First, the "impact" of which petitioner writes would stem from the Rules of Decision Act and the decisions of this Court, not of the court below, which but merely followed them. Secondly, the "impact" would not obtain unless and until the scope of the shorter statute is construed by the highest court of the state, as in Illinois, to apply to treble damage actions. This necessary condition precedent is not demonstrated by petitioner.* It is therefore too generous to state, as petitioner does (Petition, p. 14) that the effect of the decision below is "thus national in scope." The controlling effect of the decision will be limited to those cases involving the Illinois law of limitations. No decision could be more local in effect.

**B. The Cases Cited by Petitioner Present No Conflict.**

Of the many cases cited by petitioner as demonstrating its claim of conflict, only four dealt with the matter of the bar of limitations to treble damage actions either under the

* This condition precedent does not exist in Tennessee, one of the "impact" states specified by petitioner. (Petition, p. 14, fn. 2.) *Doty* v. *Federal Land Bank of Louisville*, 173 Tenn. 140, 114 S. W. 2d 953 (1938). It apparently does not exist in Utah and California, and the statement has been expressed that the condition precedent would probably not exist with reference to statutes comparable to those of Utah and California. *Christensen* v. *Paramount Pictures*, 95 F. Supp. 446, 449-450 (D. Utah, 1951).

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Sherman or Clayton Acts, and not one of these four cases concerned limitations laws at all similar to the pattern of the Illinois provisions.

In *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390 (1906), the Tennessee one year limitation law, barring after such time an action for "statute penalties"—as distinct from the Illinois two year law barring "actions for *damages* [emphasis supplied] * * * for a statutory penalty"—was considered inapplicable, not by virtue of some overriding federal law or policy, but by virtue of the restricted reach of that local Tennessee one year law, as declared by a judge learned in Tennessee law. This position has since been reaffirmed in Tennessee. *Doty* v. *Federal Land Bank of Louisville,* 173 Tenn. 140, 114 S. W. 2d 953 (1938).

With regard to the other three cases, which were decisions in other circuits, *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n,* 128 F. 2d 645 (4th Cir. 1942), involved the matter of survivability which the Virginia law there concerned had made referable as the criterion of the applicability of its one, or five, year statute; and *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (9th Cir. 1948), as well as *State of Oklahoma* v. *American Book Co.,* 144 F. 2d 585 (10th Cir. 1944), dealt, respectively, with California and Oklahoma law, each of which provided that actions upon a statute for a penalty or forfeiture should be brought within one year, actions upon a liability created by statute, other than a penalty or forfeiture, should be brought within three years, and all other actions within four years (five, in the case of Oklahoma). The Illinois law, as heretofore noted, has no provision limiting "an action upon a liability created by statute, other than a penalty or forfeiture"; the Illinois law differentiates only between "actions for damages * * * for a statutory penalty" and "all other civil actions."

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The differences among the statutory patterns of Illinois, California, Oklahoma, Tennessee, and Virginia serve only to heighten the impossibility of conflict among the decisions interpreting these laws, not its presence. Cf. *Bauserman* v. *Blunt,* 147 U. S. 647, 657 (1893); *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 34 (1924).

Nor do petitioner's copious references to other decisions of the several circuits afford any basis for a claim of conflict. They simply do not concern the matter of limitations in Section 4 Clayton Act actions at all.* The cases to which petitioner has pointed do not justify its position.

The prior decisions of the court below, also cited by petitioner as being in conflict with its present decision, were formulated, like the other cases presented by it, under widely divergent circumstances. Thus, in *Roseland* v. *Phister Mfg. Co.,* 125 F. 2d 417 (7th Cir. 1942), the question was whether the complaint stated a claim. *Activated Sludge* v. *Sanitary Dist. of Chicago,* 64 F. Supp. 25 (N. D.

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* In the 2nd Circuit, the question in the three cases cited did not concern the statute of limitations. Rather, they involved *assignment, United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574 (2nd Cir. 1916); *survivability, Sullivan* v. *Associated Bill Posters & Distributors,* 6 F. 2d 1000 (2nd Cir. 1925); and *discovery, Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 63 F. 2d 778 (2nd Cir. 1933).

In the 3rd Circuit, the question in the case cited neither concerned a Section 4 Clayton Act case or the statute of limitations. Rather, it involved the *jurisdiction* of the federal courts to entertain a rent overcharge dispute under $3,000. *Fields* v. *Washington,* 173 F. 2d 701 (3rd Cir. 1949).

In the 4th Circuit, the question was not reached in *Glenn Coal Co.* v. *Dickinson Fuel Co.,* 72 F. 2d 885 (4th Cir. 1934).

In the 5th Circuit, the question in the case cited did not concern the statute of limitations. Rather, it involved the disposition in *bankruptcy* of an unscheduled non-exempt treble damage cause of action. *Fazakerly* v. *E. Kahn's Sons Co.,* 75 F. 2d 110 (5th Cir. 1935).

In the 9th Circuit, the question in two cases did not concern a Section 4 Clayton Act case. *Culver* v. *Bell & Loffland,* 146 F. 2d 29 (9th Cir. 1944) (*overtime wages*); *Kessler* v. *Fleming,* 163 F. 2d 464 (9th Cir. 1947) (*Emergency Price Control Act*). In a third case, the question was one of *assignability, Hicks* v. *Bekins Moving and Storage Co.,* 87 F. 2d 583 (9th Cir. 1937).

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Ill. 1946), adopted *per curiam* in 157 F. 2d 517 (7th Cir. 1946), involved an action for patent infringement. And in *Moore* v. *Backus,* 78 F. 2d 571 (7th Cir. 1935), the question was one of survivability, which the court below at that time felt compelled to determine, under the now repudiated doctrine of *Swift* v. *Tyson,* 16 Pet. 1 (U. S. 1842), from federal law as a matter of "general jurisprudence."

The decision of the court below thus has presented no conflict with other federal courts. The result of the decision, resting as it does on law indigenous to Illinois, is but a local matter. As has been noted above, its effect is far from "national in scope." Petitioner's complaint (Petition, pp. 13-15) that the decision will somehow curtail pending or future private anti-trust actions both within and without the State of Illinois—an assumption which is by no means true*—is not to be addressed to the opinion of the court below but to the Rules of Decision Act and the decisions of this Court made in accordance with that Congressional enactment.

* First, the necessary predicate of state decisional law must obtain to bring into play the Rules of Decision Act; and, secondly, the liberal jurisdiction and venue provisions of Section 12 of the Clayton Act provide access to different forums to not a few treble damage plaintiffs.

## III.

### THE JUDGMENT BELOW IS CORRECT ON ADDITIONAL GROUNDS.

Apart from its proper application of the Illinois two year statute of limitations to the present action, the judgment of the court below was further correct on the principle of *res judicata* and on the fact that petitioner's complaint does not state a claim under Section 4 of the Clayton Act, constituting, as it does, a purely private grievance of intrastate concern.

The crucial issue in both the 1945 action and in this present action was the existence or nonexistence of the alleged conspiracy between respondents to buy the two mines and to refuse to sell petitioner coal. That claimed conspiracy was found in the 1945 action, after a full trial, to be nonexistent: "Here we have absolutely no such evidence * * * there is no evidence that they [respondents] did it [the acts alleged] in combination or conspiracy." (R. 49.) In this present action plaintiff seeks another trial of that identical issue but under a different theory. This the principle of *res judicata* forbids. *Sealfon* v. *United States*, 332 U. S. 575 (1948); *Mendez* v. *General Motors Corp.*, 161 F. 2d 695 (7th Cir. 1947); *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306 (2nd Cir. 1912).

## CONCLUSION.

The present action involves no conflict within the federal judiciary and does not present any federal question of substance which has not long been settled by this court. Further, the judgment of the court below is correct on additional grounds.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated: February 1, 1952.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

**No. 501**

HOSKINS COAL AND DOCK CORPORATION,
*Petitioner,*

*vs.*

TRUAX TRAER COAL COMPANY AND
UNITED ELECTRIC COAL COMPANIES,
*Respondents.*

## PETITIONER'S REPLY TO JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## PETITIONER'S REPLY TO JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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There are several points raised by respondents which call for brief comment.

### I.

### The Court Should Limit Certiorari to the Question of the Statute of Limitations.

In Paragraph 2 of their "Questions Presented" (Resp. Bf., p. 7) and in Part III of their Brief (Resp. Bf., p. 21), respondents urge upon this Court the question of whether the present suit is barred by the application of the doctrine of *res judicata*. The judgment of the Court below, however, rests exclusively upon a determination of which of

two sections of the Illinois statutes of limitations applies to actions brought under Section 4 of the Clayton Act. The Court of Appeals expressed no opinion with respect to *res judicata,* and consequently there is no ruling by the Court below on that question which requires review by this Court.

We respectfully suggest, therefore, that this Court limit certiorari to the question of the statute of limitations. In the event that this Court should reverse the Court of Appeals, it could then remand the cause to that Court with directions to rule upon the defense of *res judicata,* which does not involve any question of public interest.

## II.

**The Petition Raises the Substantial Federal Question of Whether the Nature of a Federally Created Right Is to Be Determined by Federal or State Decisions.**

The question which this petition presents is not "indigenous" to cases pending before United States District Courts in Illinois. The petition raises a question which is presented whenever a state statute of limitations is to be applied to an action arising under an act of Congress. This question is whether federal or state decisions control in determining the nature and character of a federally created cause of action for purposes of selecting the properly applicable state statute of limitations. It is petitioner's view that this Court decided that question in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390, but that the Court below declined to follow that decision.

The defendants have attempted to obscure the question presented by distorting the decision in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361 and reading that distorted version into the Illinois statute of limitations. The argument of defendants in substance is that the words

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"statutory penalty" in the Illinois two year statute mean "actions for treble damages", and therefore there is no necessity to determine the nature of the federal action presented beyond ascertaining that it is an action for treble damages.

Respondents' argument may be summarized: The Illinois Supreme Court, in the *Jones* case, held penal a treble-damage action brought under an Illinois statute entitled "An Act to Prevent Extortion and Unjust Discrimination in the Rates Charged * * * and to Punish the Same * * *," and applied to it the two-year Illinois statute of limitations governing suits for a "statutory penalty." From this it follows, according to respondents, that the Supreme Court of Illinois applies the Illinois two-year statute to all treble damage actions and the Illinois five-year statute, which governs remedial actions, to all actions for single damages. Therefore, the two-year statute of limitations ought to be read as though it were written "Actions for treble damages * * * shall be commenced within two years next after the cause of action accrued." (Resp. Bf., pp. 8, 9.) Actions under Sec. 4 of the Clayton Act are for treble damages. Hence, say respondents, such actions come within the two-year section of the Illinois limitations act.

This argument is plainly fallacious, for it assumes that the Illinois Supreme Court, in the *Jones* case, determined that the statutory cause of action involved was penal *because of* its treble-damage feature. There is nothing whatsoever in the opinion to support that assumption. In fact, it is evident from a reading of the *Jones* case that both parties conceded that the action was penal. The title of the Illinois Railroad Extortion Act alone seems to justify the view that the cause of action created by the Act was designed to punish rather than to compensate.

Moreover, in arguing at p. 8 of their Joint Brief that the two year statute is applicable to all treble damage ac-

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tions and the five year statute to all like single damage actions, respondents have neglected to apprise the Court that the Illinois courts have applied the two year statute to single damage actions. For example, see *Gridley* v. *Barnes*, 103 Ill. 211 (1882); *Vestal Co.* v. *Robertson*, 277 Ill. 425 (1917); *Kimball* v. *Hurlbut*, 12 Ill. App. 500 (1883); *Junker* v. *Kuhnen*, 18 Ill. App. 478 (1886). It therefore makes no more sense to say that the two year limitations provision governs all treble damage actions because in the *Jones* case the Illinois Supreme Court applied it to a treble damage action than to say that it governs all actions for single damages because the Illinois Courts in the above cases have applied it to such actions.

It is obvious, then, that to warrant the application of the two year limitations statute the action must have an aspect other than that of treble damages. The additional aspect required—and wholly ignored by respondents—is that the liability imposed upon the defendant be penal in nature.

Indeed, the Illinois Courts have never discussed the meaning of the phrase "statutory penalty" in the two year statute of limitations. To contend that they have construed it as though it read "actions for treble damages" is thus wholly without justification. What the Illinois Courts have done is this: They have examined, in each case, the nature of the cause of action; after determining, from a consideration of its purpose and characteristics, that it was penal in nature, they have, as a matter of course and without interpretation or analysis, applied the two year limitations statute.

Thus, far from turning to the two year limitations statute and interpreting the words "statutory penalty" to mean "actions for treble damages," the Illinois Courts, as their first task, have invariably sought to determine whether the nature of the liability was penal. The indispensable first step, therefore, in determining whether

the two year Illinois statute is applicable to actions under Section 4 of the Clayton Act, the step which respondents have attempted to obscure, is to determine whether the treble damage liability imposed by Section 4 is penal. The petition asks this Court to decide whether this determination should be made by reference to federal or state decisions. An opinion by this Court will necessarily clarify the method to be followed in applying state limitations statutes to actions arising under acts of Congress, and will resolve the conflict created by the opinion of the Court below.

## III.

**The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeals Which Determine That a Federal Statute Is to Be Interpreted According to Federal Decisions, and Which Also Determine That Section 4 of the Clayton Act is Remedial in Character.**

Respondents' argument (Resp. Bf., p. 15) that the decision of the Court below presents no conflict with decisions of other courts of appeal, since no other court of appeals has decided what Illinois statute of limitations should be applied to an action under Section 4 of the Clayton Act, is wholly specious. Obviously, in the nature of things, no court of appeals other than the Court below would ordinarily have occasion to apply the Illinois statute of limitations to such an action.

The conflict lies in the fact that the Court below, in arriving at its decision, acted upon a basic principle which is completely at variance with the principle adopted by Courts of Appeals of other circuits in like cases.

The decision of the Court below is based upon the proposition that for purposes of applying state statutes of limitations, the character of the action under Section 4 of the

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Clayton Act is to be determined by reference to state, not federal decisions. Other courts of appeals have taken the opposite view. (Petn., p. 10-13.)

An additional important conflict lies in the fact that other courts of appeals have decided that actions under Section 4 of the Clayton Act are remedial in character (Petn., pp. 6-9), whereas the Court below held they are penal even under federal law.

These are fundamental conflicts which this Court ought to resolve. The decision of the Court below does much more than create confusion with respect to the nature and enforcement of treble damage actions under the antitrust laws. If the decision that the nature of Section 4 of the Clayton Act is to be interpreted according to state decisions is allowed to stand, it will be cited as authority that the nature of other federal statutes are to be construed according to the same principle. Diversity from state to state in the interpretation of the nature of federal statutes and the consequent force and effect to be given to Congressional policy is the inevitable consequence of the doctrine adopted by the Court below.

## IV.

## The Effect of the Decision of the Court Below Is Not Confined to the State of Illinois.

The argument of respondents that the decision of the Court below has no effect outside of Illinois (Resp. Bf., pp. 15-17) is unreal, because it ignores the principles underlying the decision. In addition to determining the character of the action created by Section 4 of the Clayton Act by reference to state decisions, the Court below held that that action was penal under federal authorities as well. If other circuit courts of appeals should come to share this view, even if they do not follow state court

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analogies they may apply the generally shorter state statutes of limitations applicable to actions for penalties. Already, on the basis of the decision below, the defendants, in a long-pending treble damage antitrust case in Indiana, have recently amended their answer to plead the Indiana two-year statute of limitations governing actions upon a penalty.[1] This is clearly the beginning of a wide-spread effort of antitrust defendants to use the opinion of the Court below to have antitrust treble damage actions declared penal. Only correction by this Court of the decision of the Court below can prevent the anomaly of "penal" antitrust cases in some states and "remedial" antitrust cases in others.

**Conclusion.**

Wherefore, petitioner respectfully submits that the questions involved in this case are of such basic importance that this Court should exercise its supervisory powers and grant certiorari.

Respectfully submitted,

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1. *Three Rivers Glass Co.* v. *Ball Brothers, et al.*, Dist. Ct. for the Southern District of Indiana, Civil Action No. 1523. Indiana has a 2-year period of limitations upon a penalty governed by statute and a 15-year period of limitations upon actions not otherwise provided for. Burns Ind. Stat. Ann. (1946), Secs. 2-602, 2-603.

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